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Constitutionality of Warrantless Aerial Surveillance, The--Fourth Amendment: California v. Ciraolo, 106 S. Ct. 1809 (1986)

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FOURTH AMENDMENT—THE CONSTITUTIONALITY OF WARRANTLESS AERIAL SURVEILLANCE

California v. Ciraolo, 106 S. Ct. 1809 (1986).

I. INTRODUCTION

Law enforcement agencies have increasingly employed aerial surveillance in order to detect illegal activities.¹ When presented with the police's use of aerial observation, the lower courts have been unable to provide a consistent method of analysis to determine whether warrantless aerial surveillance constitutes an "unreasonable search" under the fourth amendment.² The Supreme Court recently attempted to resolve this issue in *California v. Ciraolo*.³ In this case, the Santa Clara Police received an anonymous tip that Ciraolo was growing marijuana in his backyard.⁴ In order to confirm this information, the police without first obtaining a warrant chartered an airplane and made naked-eye observations of Ciraolo's home and his backyard.⁵ Ciraolo argued that the warrantless aerial surveillance of his home and its curtilage constituted an unconstitutional search under the fourth amendment.⁶ The Supreme Court held in a

¹ Recent Developments, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 VAN. L. REV. 409 (1982)[hereinafter *Warrantless Aerial Surveillance*].

² The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Through the fourteenth amendment, the fourth amendment applies to the states. See *Ker v. California*, 374 U.S. 23 (1963); *Wolf v. Colorado*, 338 U.S. 25 (1949). Concerning the conflict in the lower courts, see generally, *Warrantless Aerial Surveillance*, *supra* note 1, at 416-31; Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 739-50 (1985); Annotation, *Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure*, 56 A.L.R. Fed. 772 (1982).

³ 106 S. Ct. 1809 (1986).

⁴ *Id.* at 1810.

⁵ *Id.* at 1814 (Powell, J., dissenting).

⁶ *Id.* at 1812. See *infra* notes 30-45 and accompanying text for a discussion of the curtilage doctrine and its importance in fourth amendment jurisprudence.

five-to-four decision that the warrantless observation of Ciraolo's backyard from navigable airspace did not violate the fourth amendment.⁷

This Note begins with a brief discussion of the legal history of the fourth amendment and the curtilage doctrine. The Note then summarizes both the background of the case and the majority and dissenting opinions. Moreover, the Note analyzes these opinions by examining the internal inconsistencies in the Court's precedent and the conflicting interpretations of that precedent. Finally, the Note discusses the future implications of the Court's holding.

II. THE FOURTH AMENDMENT

Prior to achieving independence from Great Britain, the colonists frequently experienced arbitrary searches and seizures under the "writs of assistance."⁸ In order to enforce British tax laws, the writs of assistance gave colonial revenue officers the authority to search wherever they pleased for smuggled goods.⁹ In 1761, James Otis, Jr. argued on behalf of sixty-three Boston merchants against the issuance of the writs.¹⁰ Otis characterized the writs as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer."¹¹ Although Otis lost this particular case,¹² the debate served as a catalyst for colonial resistance against the abusiveness of British rule.¹³ Remembering these indiscriminate governmental intrusions upon the privacy of the colonists, the framers of the Constitution adopted the fourth amendment.¹⁴

The framers sought to preclude more than the general abuses of the writs of assistance through the fourth amendment. The pro-

⁷ 106 S. Ct. at 1813. The majority in *Ciraolo* included Chief Justice Burger and Justices White, Rehnquist, Stevens, and O'Connor. The dissenting justices were Justices Powell, Brennan, Marshall, and Blackmun. Chief Justice Burger wrote the opinion for the Court, and Justice Powell wrote the single dissenting opinion.

⁸ *Boyd v. United States*, 116 U.S. 616, 625 (1886).

⁹ *Id.*

¹⁰ 1 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.1, at 4 (1978).

¹¹ *Boyd*, 116 U.S. at 625 (quoting *Cooley's Constitutional Limitations* 301-03).

¹² 1 W. LAFAVE, *supra* note 10, § 1.1, at 4.

¹³ Referring to the debate concerning the writs of assistance, John Adams stated that "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born." *Boyd*, 116 U.S. at 625.

¹⁴ *Payton v. New York*, 445 U.S. 573, 583 (1980).

visions of the amendment " 'reached farther than the concrete form' of the specific cases that gave it birth, and 'apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.' " ¹⁵

The warrant requirement in the fourth amendment places a "neutral and detached magistrate" between the eagerness of police officers to discover evidence of criminal activity and an individual's privacy. ¹⁶ The magistrate determines whether or not sufficient probable cause exists to justify the issuance of a search warrant. ¹⁷ Unlike government enforcement officials, who may become overzealous in their efforts to detect crime and enforce the law, the magistrate occupies a position that allows him to evaluate and balance the needs of the police against the privacy interests of society. ¹⁸

Under the fourth amendment, searches conducted without the prior issuance of a warrant are *per se* unreasonable. ¹⁹ Only under limited circumstances may the police conduct a search without first obtaining a warrant. ²⁰ Although the fourth amendment does not specifically prescribe what penalties the government will incur should its agents engage in an unconstitutional search, the Court

¹⁵ *Id.* at 585 (quoting *Boyd*, 116 U.S. at 630). Chief Justice Burger reaffirmed that the scope of fourth amendment protection goes beyond protecting individuals from the colonial abuses that instigated the adoption of the amendment. He observed that

[a]lthough the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers, were those involving invasions of the home, it would be a mistake to conclude . . . that the Warrant Clause was therefore intended to guard only against intrusions into the home. First, the Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches. Moreover, if there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.

United States v. Chadwick, 433 U.S. 1, 8-9 (1977).

¹⁶ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹⁷ *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932). Probable cause exists "where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York*, 388 U.S. 41, 55 (1967).

¹⁸ *Johnson*, 333 U.S. at 14. To allow police officers instead of a magistrate to determine when and where efficient law enforcement overrides an individual's privacy would "reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Id.* (footnote omitted).

¹⁹ *Katz v. United States*, 389 U.S. 347, 357 (1967).

²⁰ The exceptions to the warrant requirement are: searches made contemporaneously with a lawful arrest, *Agnello v. United States*, 269 U.S. 20, 30 (1925); searches conducted while the police are engaged in "hot pursuit," *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); and when an individual consents to the search, *Zap v. United States*, 328 U.S. 624, 630 (1946).

has strengthened the dictates of the amendment through its development of the exclusionary rule.

In 1914, the Court first created the exclusionary rule in *Weeks v. United States*.²¹ In *Weeks*, the Court held that government officials who searched for and seized evidence in violation of the fourth amendment could not then admit that evidence in criminal proceedings taking place in federal courts.²² Later, in *Wolf v. Colorado*, the Court held that the fourth amendment did not require the exclusion of unlawfully obtained evidence in state proceedings.²³ Ultimately, the Court reversed itself in *Mapp v. Ohio* and held that the due process clause of the fourteenth amendment required the application of the exclusionary rule to state criminal proceedings.²⁴

The Court extended the scope of the exclusionary rule in what has come to be known as the "fruit of the poisonous tree" doctrine.²⁵ According to this doctrine, all evidence later discovered and derived from an unconstitutional search or seizure also falls under the exclusionary rule.²⁶ Therefore, if the police unconstitutionally gather evidence in order to demonstrate probable cause to a magistrate and thereby obtain a search warrant, the evidence seized during the execution of the search warrant will still be inadmissible in

²¹ 232 U.S. 383 (1914). Prior to *Weeks*, the court allowed the exclusion of evidence at trial in *Boyd v. United States*, 116 U.S. 616 (1886). Because *Boyd* involved the violation of the petitioner's fourth and fifth amendment rights, it is not viewed as the "original source" of the exclusionary rule. Note, *The Erosion of the Exclusionary Rule Under the Burger Court*, 33 BAYLOR L. REV. 363, 363 n.4 (1981).

²² *Weeks*, 232 U.S. at 398.

²³ 338 U.S. 25, 33 (1949).

²⁴ 367 U.S. 643, 655 (1961). In *Mapp*, Justice Clark stated:

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

Mapp, 367 U.S. at 655.

²⁵ *Nardone v. United States*, 308 U.S. 338, 341 (1939).

²⁶ Writing the opinion for the Court in *Segura v. United States*, 468 U.S. 796 (1984), Chief Justice Burger stated that

[u]nder this Court's holdings, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." It "extends as well to the indirect as the direct products" of unconstitutional conduct.

Segura, 468 U.S. at 804 (citations omitted). See *United States v. Crews*, 445 U.S. 463, 470 (1980).

court.²⁷ Government officials may avoid the application of the exclusionary rule and its "fruit of the poisonous tree" doctrine by demonstrating that the evidence obtained falls under one of the specific exceptions to the rule: the "independent source", "attenuation", "inevitable discovery" or "good-faith" exceptions.²⁸

With the development of the exclusionary rule and its "fruit of the poisonous tree" doctrine, the Court has provided another check upon police behavior in addition to the warrant requirement which the fourth amendment expressly demands. In *Mapp*, the Court concluded that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"²⁹

III. THE CURTILAGE AND THE "OPEN FIELDS" EXCEPTION

The curtilage consists of "the land immediately surrounding

²⁷ The California Court of Appeal noted in *People v. Ciraolo* that "an unconstitutional search cannot be used as the basis for issuance of a search warrant or the Fourth Amendment would be rendered meaningless." *People v. Ciraolo*, 161 Cal. App. 3d 1801, 1806, 208 Cal. Rptr. 93, 95 (1984)(footnote and citations omitted).

²⁸ *United States v. Crews*, 445 U.S. 463, 470 (1980). While discussing the independent source exception to the exclusionary rule, Justice Holmes observed that

[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. . . .

Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). See *United States v. Wade*, 388 U.S. 218, 242 (1967); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Costello v. United States*, 365 U.S. 265, 278-80 (1961).

The independent source exception is closely related to the attenuation exception. In *Nardone*, the Court analyzed the independent source exception and went on to note that the connection between the government's illegal behavior and the evidence seized "may have become so attenuated as to dissipate" the tainted nature of that evidence. *Nardone*, 308 U.S. at 341. The Court of Appeals for the Seventh Circuit recognized the existence of the inevitability exception in *United States ex rel. Owens v. Twomey*, 508 F.2d 858, 865-66 (7th Cir. 1974).

The Supreme Court discussed the good-faith exception in *United States v. Leon*, 468 U.S. 897 (1984). Under the good-faith exception, the prosecution may admit evidence gathered pursuant to a warrant issued by a neutral magistrate even though later evidence reveals that no probable cause existed for the issuance of the warrant. In *People v. Ciraolo*, the California Court of Appeal found *Leon* inapplicable. Quoting *Leon*, the court decided that the "'good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment . . .'" *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1085, 208 Cal. Rptr. 93, 95 (1984)(emphasis in original)(quoting *United States v. Leon*, 468 U.S. 897, 924 (1984)).

²⁹ *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)(quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

and associated with the home.”³⁰ Although the fourth amendment does not explicitly provide any protection to the curtilage, it does protect “houses” from “unreasonable searches.”³¹ In order to determine the area of the curtilage, the lower courts have examined the facts involved in the case to see if the property owner has manifested some expectation of privacy in the area surrounding his home.³²

The common law views the curtilage as part of the house.³³ The Supreme Court has acknowledged the importance of the common law in its fourth amendment jurisprudence³⁴ and has extended some of that amendment’s protection to the curtilage.³⁵ The Court noted that “the curtilage . . . has been considered part of the home itself for Fourth Amendment purposes.”³⁶ The Court, however, appears unwilling to expressly provide the curtilage with the full protection of the fourth amendment.³⁷

The fourth amendment’s guaranty against unreasonable

³⁰ *Oliver v. United States*, 466 U.S. 170, 180 (1984). *Black’s Law Dictionary* defines the curtilage, more broadly, as:

A piece of ground commonly used with the dwelling house. A small piece of land, not necessarily inclosed, around the dwelling house, and generally includes the buildings used for domestic purposes in the conduct of family affairs. A courtyard or the space of ground adjoining the dwelling house necessary and convenient and habitually used for family purposes and the carrying on of domestic employments. A piece of ground within the common inclosure belonging to a dwelling house, and enjoyed with it for its more convenient occupation.

For search and seizure purposes includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.

BLACK’S LAW DICTIONARY 346 (5th ed. 1979).

³¹ See *supra* note 2.

³² William Blackstone viewed the existence of a common fence as one way to define the curtilage. 4 W. BLACKSTONE, COMMENTARIES *225. The court of appeals found that [w]hether the place searched is within the curtilage is to be determined from the facts, including the proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.

Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956), *cert. denied*, 351 U.S. 932 (1956)(citation omitted).

³³ In his discussion of the crime of burglary, William Blackstone notes that outbuildings such as a “barn, stable, or warehouse” that are located on the same land as the “dwelling-house” and surrounded by a common fence have the same protection against burglary as the house itself. “[F]or the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall . . .” 4 W. BLACKSTONE, COMMENTARIES *225.

³⁴ *Payton v. New York*, 445 U.S. 573, 597 n.45 (1980)(“We have long recognized the relevance of the common law’s special regard for the home to the development of Fourth Amendment jurisprudence.”(citation omitted)).

³⁵ *Oliver v. United States*, 466 U.S. 170, 180 (1984).

³⁶ *Id.*

³⁷ See *infra* note 129.

searches may encompass the home and its curtilage, but the Court has consistently refused to expand the scope of fourth amendment protection to include "open fields."³⁸ The exact definition of open fields, however, remains somewhat ambiguous. Open fields are those areas located outside the curtilage³⁹ that "'do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance.'"⁴⁰ According to the Court, "[a]n open field need be neither 'open' nor a 'field' as those terms are used in common speech."⁴¹ Examples of open fields include: public highways and roads,⁴² farmland,⁴³ and the woods located behind an individual's home.⁴⁴ Since the protections of the fourth amendment do not extend to the open fields, government agents may constitutionally enter and observe activities taking place there without first obtaining a warrant.⁴⁵

IV. THE DEFINITION OF A SEARCH UNDER THE FOURTH AMENDMENT

A search usually consists of an examination of a person, his home or his property with the intent to discover contraband or some other "evidence of guilt to be used in the prosecution of a criminal action."⁴⁶ The fourth amendment, however, fails to expressly state what actions constitute a "search" that would trigger the warrant requirement.⁴⁷ In order to deal with this ambiguity, the Supreme Court has developed several methods of analysis to determine the existence of a "search" under the fourth amendment.

Through the adoption of the English common law, the Court originally instituted a test to determine the existence of a fourth amendment search based upon the concept of the "constitutionally

³⁸ See, e.g., *Oliver*, 466 U.S. at 170; *Hester v. United States*, 265 U.S. 57, 59 (1924).

³⁹ *Oliver*, 466 U.S. at 180 n.11.

⁴⁰ *Dow Chemical Co. v. United States*, 106 S. Ct. 1819, 1825 (1986)(quoting *Oliver*, 466 U.S. at 179).

⁴¹ *Oliver*, 466 U.S. at 180 n.11. Professor LaFare observed that "the lower courts have applied the open fields characterization to virtually any lands which do not fall within the curtilage." 1 W. LAFARE, *supra* note 10, § 2.4(a) at 332.

⁴² *United States v. Knotts*, 460 U.S. 276, 282 (1983).

⁴³ *Oliver*, 466 U.S. at 179.

⁴⁴ *Id.* at 174.

⁴⁵ *Id.* at 177. See *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974).

⁴⁶ BLACK'S LAW DICTIONARY 1211 (5th ed. 1979). The exclusionary rule generally applies to those searches "in which there is a quest for, a looking for, or a seeking out of that which offends against the law by law enforcement personnel or their agents." *Id.* See *California v. Ciraolo*, 106 S. Ct. 1809, 1819 (1986)(Powell, J., dissenting).

⁴⁷ See *supra* note 2.

protected area.”⁴⁸ According to the English common law, only physical intrusions, such as a trespass, violated an individual’s right to privacy.⁴⁹ A fourth amendment search of the home or its curtilage, therefore, could only take place when government agents committed a physical intrusion into these areas.⁵⁰ Since a search consisted of an actual physical invasion, this meant that the ear or the eye could not commit a search under the fourth amendment.⁵¹

In *Katz v. United States*,⁵² the Court changed the focus of fourth amendment jurisprudence by holding that the electronic wiretapping of a public telephone booth constituted a “search” under the fourth amendment.⁵³ The Court noted that the “constitutionally protected area” concept based upon physical intrusion did not serve as a “talismanic solution to every Fourth Amendment problem.”⁵⁴ The protection of the fourth amendment extended to people, not places.⁵⁵

Writing the plurality opinion, Justice Stewart developed an ambiguous and slightly contradictory privacy standard. He concluded that “[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁵⁶ Since *Katz* had “justifiably relied” upon the privacy of the telephone booth, the electronic interception and recording of his conversations was a “search and seizure” under the fourth amendment.⁵⁷ This warrant-

⁴⁸ The Court’s emphasis on the English common law appears in *Boyd v. United States*, 116 U.S. 616, 630 (1886). Cases discussing the doctrine of the “constitutionally protected area” include: *Berger v. New York*, 388 U.S. 41, 57, 59 (1967); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963); *Lanza v. New York*, 370 U.S. 139, 142-43 (1962); *Silverman v. United States*, 365 U.S. 505, 510, 512 (1961).

⁴⁹ *Warrantless Aerial Surveillance*, *supra* note 1, at 412.

⁵⁰ The Court stated in *Olmstead v. United States*:

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an *actual physical invasion of his house “or curtilage”* for the purpose of making a seizure.

Olmstead v. United States, 277 U.S. 438, 466 (1928)(emphasis added).

⁵¹ See, e.g., *Olmstead*, 277 U.S. at 464 (wiretapping and recording private telephone conversations without a warrant did not violate the fourth amendment); *United States v. Lee*, 274 U.S. 559, 563 (1927)(use of a searchlight or a field glass does not amount to a search under the fourth amendment).

⁵² 389 U.S. 347 (1967)(plurality opinion).

⁵³ *Id.* at 353.

⁵⁴ *Id.* at 351 n. 9.

⁵⁵ *Id.* at 351.

⁵⁶ *Id.* at 351-52 (citations omitted).

⁵⁷ *Id.* at 353.

less search and seizure did not fall within any of the exceptions to the warrant requirement.⁵⁸ The search and seizure, therefore, were unreasonable and violated the fourth amendment.⁵⁹

In his concurring opinion, Justice Harlan agreed that the Court should abandon the definition of a search based upon physical intrusion.⁶⁰ He warned that the physical intrusion test's "limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion."⁶¹ Justice Harlan introduced the reasonable expectation of privacy analysis that the Court would follow in subsequent decisions.⁶²

According to Justice Harlan, an individual has a "constitutionally protected reasonable expectation of privacy."⁶³ To delineate the scope of fourth amendment protection of this privacy expectation, Justice Harlan's *Katz* test consists of a twofold inquiry. First, a person has to have "exhibited an actual (subjective) expectation of privacy."⁶⁴ Second, that expectation has to "be one that society is

⁵⁸ *Id.* at 357-58. See *supra* note 20.

⁵⁹ *Id.* at 357.

⁶⁰ *Id.* at 362 (Harlan, J., concurring).

⁶¹ *Id.*

⁶² See, e.g., *California v. Ciraolo*, 106 S. Ct. 1809, 1811 (1986); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

⁶³ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

⁶⁴ *Id.* at 361 (Harlan, J., concurring). The first prong of the *Katz* test has encountered criticism from commentators and justices in subsequent cases. Critics have argued that the first prong creates a sliding scale of fourth amendment protection. As advanced surveillance techniques become more common, an individual will no longer have a subjective expectation of privacy from this surveillance. For example, Professor Anthony Amsterdam found:

An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974). Writing the opinion for the Court, Justice Blackmun arrived at a similar conclusion in *Smith v. Maryland*, 442 U.S. 735 (1979):

Situations can be imagined, of course, in which *Katz*' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play

prepared to recognize as 'reasonable.'"⁶⁵

The *Katz* test, with its focus upon a person's reasonable expectation of privacy, rather than upon a "constitutionally protected area," made it appear that the concepts of the curtilage and the open fields were no longer necessary in fourth amendment jurisprudence. Professor Wayne LaFave thought it rather "bizarre that the curious concept of the curtilage, originally taken to refer to the land and buildings within the baron's stone walls, should ever have been deemed to be of controlling significance as to the constitutional limits upon the powers of the police."⁶⁶

Seventeen years after *Katz*, in *Oliver v. United States*,⁶⁷ the concepts of the curtilage and the open fields returned, occupying an important place in fourth amendment jurisprudence. In holding that the intrusion of government agents into the open fields was not a fourth amendment search, the Court adopted a literal interpretation of the fourth amendment purportedly within the framework of the *Katz* test.⁶⁸ First, the Court determined that the open fields did not fall within any of the specific areas the fourth amendment sought to protect. The open fields were not "persons," "papers" or "effects."⁶⁹ Second, the Court concluded that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."⁷⁰

Under this literalistic fourth amendment analysis, the curtilage once again derived its protected status from the home and not solely from a reasonable expectation of privacy. The reemergence of the curtilage doctrine also reintroduced the question of what protections the fourth amendment gives to the home that it does not give to the curtilage.⁷¹

no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.

Id. at 740 n.5. At one point, Justice Harlan abandoned the first prong of the *Katz* test when he noted that "[t]he analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of the laws that translate into rules the customs and values of the past and present." *United States v. White*, 410 U.S. 745, 786 (1971)(Harlan, J., dissenting).

⁶⁵ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁶⁶ 1 W. LAFAVE, *supra* note 10, § 2.3 at 314.

⁶⁷ 466 U.S. 170 (1984).

⁶⁸ *Id.* at 176 n.6, 184.

⁶⁹ *Id.* at 176-77.

⁷⁰ *Id.* at 178.

⁷¹ See *infra* note 129 and accompanying text.

V. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 2, 1982, an anonymous telephone caller informed the Santa Clara Police that Dante Carlo Ciraolo was growing marijuana in his backyard.⁷² When Officer Shutz went to the Ciraolo residence in order to investigate, he could not observe the backyard from ground-level because a six-foot high outer fence and a ten-foot high inner fence completely enclosed the backyard.⁷³

That same day, Shutz chartered a private airplane in order to observe Ciraolo's fenced-in backyard.⁷⁴ Both Shutz and his companion on the flight, Officer Rodriguez, had training in marijuana identification.⁷⁵ Without first acquiring a warrant,⁷⁶ the two police officers flew over Ciraolo's property and observed the marijuana growing in his backyard.⁷⁷ They also took aerial photographs of the area.⁷⁸ During the overflight, the aircraft remained in navigable airspace at an altitude of one thousand feet.⁷⁹

⁷² *California v. Ciraolo*, 106 S. Ct. 1809, 1810 (1986). Section 11358(a) of the California Health & Safety Code provides:

Every person who plants, cultivates, harvests, dries or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in the state prison for a period of not less than one year or more than 10 years and shall not be eligible for release upon completion of sentence or on parole or any basis until he has been imprisoned for a period of not less than one year in the state prison.

CAL. HEALTH AND SAFETY CODE § 11358(a) (West 1975).

⁷³ *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1085, 208 Cal. Rptr. 93, 94 (1984). Because of the yard's location directly in back of the house, the house also constituted part of the perimeter of the fence. *Ciraolo*, 106 S. Ct. at 1814 (Powell, J., dissenting).

⁷⁴ *Ciraolo*, 106 S. Ct. at 1810.

⁷⁵ *Id.* Marijuana has certain physical characteristics which enable trained police officers to identify the plant even from high altitudes. Marijuana has a distinct shade of green which makes it distinguishable from the vegetation surrounding it. *People v. St. Amour*, 104 Cal. App. 3d 886, 889, 163 Cal. Rptr. 187, 189 (1980). The plant also has its own particular configuration. *Id.* See Williams, *Aerial Surveillance to Detect Growing Marijuana*, 52 FBI L. ENFORCEMENT BULL. 9, 11 (1983).

⁷⁶ *Ciraolo*, 106 S. Ct. at 1814 (Powell, J., dissenting).

⁷⁷ *Id.* at 1810.

⁷⁸ *Id.* at 1810-11.

⁷⁹ *Id.* at 1810. Regulations dictate the various altitudes at which a plane may lawfully navigate. The Code of Federal Regulations provides, in relevant part, that

[e]xcept when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

....

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) *Over other than congested areas.* An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

14 C.F.R. 91.79 (1986). All members of the public have a right to travel through navigable airspace. According to the United States Code, "[t]here is recognized and declared

In his affidavit, Shutz described the anonymous telephone call and his naked-eye, aerial observations of the marijuana growing in Ciraolo's backyard.⁸⁰ He also attached an aerial photograph of the area to his affidavit.⁸¹ Based upon this information, Shutz obtained a search warrant for Ciraolo's home and backyard.⁸² On September 9, 1982, the police executed the warrant and seized seventy-three marijuana plants from Ciraolo's backyard.⁸³

Invoking the California Penal Code, Ciraolo moved to have the plants suppressed as evidence, and the trial court denied this motion.⁸⁴ Ciraolo then pleaded guilty⁸⁵ and was convicted for the cultivation of marijuana.⁸⁶ The California Court of Appeal reversed.⁸⁷

In its decision, the court examined the protection the fourth amendment afforded to the curtilage and the expectation of privacy Ciraolo had concerning his backyard.⁸⁸ The court concluded that Ciraolo's backyard was within the curtilage and that he had displayed a reasonable expectation of privacy from aerial surveillance by constructing such tall fences around his yard.⁸⁹ The court, how-

to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. app. § 1304 (1982).

⁸⁰ *Ciraolo*, 106 S. Ct. at 1814 (Powell, J., dissenting).

⁸¹ *Id.* The issuance of the warrant was based upon the affidavit of Officer Shutz regarding his observations of the marijuana and not upon the photograph. According to Shutz's testimony, "the photograph did not identify the marijuana as such because it failed to reveal a 'true representation' of the color of the plants: 'you have to see it with the naked eye.'" *Id.* at 1812 n.1 (citation omitted).

⁸² *Id.* at 1814. The warrant specifically allowed Shutz to search the house, its garage, and the yard for "marijuana, narcotics paraphernalia, records relating to marijuana sales, and documents identifying the occupant of the premises." *Id.* at 1814 n.1.

⁸³ *Id.* at 1811.

⁸⁴ *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1085, 208 Cal. Rptr. 93, 94 (1984). The California Penal Code provides the grounds for which a defendant may move for the suppression of evidence:

(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

CAL. PENAL CODE § 1538.5(a) (West 1975).

⁸⁵ *Ciraolo*, 106 S. Ct. at 1811.

⁸⁶ *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1084, 208 Cal. Rptr. 93, 94 (1984); see *supra* note 72.

⁸⁷ *People v. Ciraolo*, 161 Cal. App. 3d at 1090, 208 Cal. Rptr. at 98.

⁸⁸ *Id.* at 1087-89, 208 Cal. Rptr. at 96-98.

⁸⁹ *Id.* at 1089, 208 Cal. Rptr. at 97. In determining that Ciraolo's backyard was in fact within the curtilage of the home, the court placed considerable emphasis on Oliver

ever, failed to explicitly apply the second prong of the *Katz* test: whether society would find Ciraolo's expectation of privacy from aerial surveillance to be reasonable.

Without citing any authority, the court found that a qualitative difference existed between routine aerial police patrols and focused aerial surveillance of a specific home.⁹⁰ The court then held that the warrantless police flight over Ciraolo's curtilage, an area where he had a reasonable expectation of privacy, violated the fourth amendment's prohibition against unreasonable searches.⁹¹ The evidence that the police officers gathered during this "unconstitutional search" could not support a warrant.⁹² After the California Supreme Court refused to review the case, the Supreme Court of the United States granted certiorari.⁹³

VI. SUMMARY OF THE OPINIONS

A. THE MAJORITY

In his opinion for the Court, Chief Justice Burger began his fourth amendment analysis by restating both prongs of the *Katz*

v. United States, 466 U.S. 170 (1984). *Ciraolo*, 161 Cal. App. 3d at 1087-89, 208 Cal. Rptr. at 96-97. The court also noted the Supreme Court's dicta in *Oliver* concerning aerial surveillance. Writing the opinion for the Court in *Oliver*, Justice Powell stated that "the public and police may lawfully survey lands from the air." *Oliver*, 466 U.S. at 179 (footnote omitted). In order to support this conclusion, Justice Powell cited two federal cases: *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), and *United States v. DeBacker*, 493 F. Supp. 1073 (W.D. Mich. 1980). *Id.* at 179 n.9. The California Court of Appeal distinguished these cases on the basis of their distinct facts. According to the court's analysis of *Allen*, the owners of a two hundred acre ranch near the Oregon sea-coast did not have a reasonable expectation of privacy from aerial surveillance due to the frequency of Coast Guard helicopter overflights. *Ciraolo*, 161 Cal. App. 3d at 1088, 208 Cal. Rptr. at 97. The court also distinguished *DeBacker*, finding that *DeBacker* involved aerial surveillance of the open fields and not the curtilage. *Id.* at 1089, 208 Cal. Rptr. at 97. The court then concluded that Justice Powell's dicta concerning aerial surveillance did "not remove Fourth Amendment protection from the curtilage." *Id.*, 208 Cal. Rptr. at 97. The Supreme Court later confirmed this conclusion in two distinct ways. In the *Ciraolo* decision, a case which involved aerial surveillance of the curtilage, the Court did not mention the dicta in *Oliver* concerning aerial surveillance. In *Dow Chemical Co. v. United States*, 106 S. Ct. 1819 (1986), the Court expressly stated that "*Oliver* recognized that in the open field context, 'the public and police lawfully may survey lands from the air.'" *Id.* at 1826.

⁹⁰ *Ciraolo*, 161 Cal. App. 3d at 1089, 208 Cal. Rptr. at 97. The court found this qualitative difference between the two types of overflights in the context of Ciraolo's reasonable expectation of privacy. *Id.*, 208 Cal. Rptr. at 97. The court seemed to suggest that similar to the ranch owners in *Allen*, Ciraolo could not have a reasonable expectation of privacy concerning routine aerial surveillance. *Id.*, 208 Cal. Rptr. at 97.

⁹¹ *Id.* at 1090, 208 Cal. Rptr. at 98.

⁹² *Id.*, 208 Cal. Rptr. at 98.

⁹³ *California v. Ciraolo*, 106 S. Ct. 1809, 1811 (1986).

test.⁹⁴ The Chief Justice then determined whether Ciraolo had displayed a subjective expectation of privacy from naked-eye, aerial observation of his backyard and whether society would be willing to accept this expectation as reasonable.⁹⁵

The Court concluded that the existence of a ten-foot fence around the backyard manifested Ciraolo's subjective expectation of privacy from the surveillance of "normal sidewalk traffic."⁹⁶ The fence constituted one of the "normal precautions" that an individual would take to protect his privacy from ground-level observation.⁹⁷

The Court noted, however, that a ten-foot fence would not conceal Ciraolo's backyard from a person "on top of a truck or a 2-level bus."⁹⁸ It was therefore difficult for the Court to conclude that Ciraolo had displayed a subjective expectation of privacy from "all" surveillance of his backyard.⁹⁹ Rather than attempt to settle this issue, Chief Justice Burger turned to the second part of the *Katz* test.

Prior to adjudicating the reasonableness of Ciraolo's expectation of privacy, Chief Justice Burger reaffirmed the Court's language in *Oliver* regarding the factors that delineate the scope of fourth amendment protection.¹⁰⁰ The examination of reasonableness does

⁹⁴ *Id.* at 1811.

⁹⁵ *Id.* In the lower court, both parties focused on the reasonableness of aerial surveillance in general and did not raise the issue of the photograph that the Santa Clara Police took of Ciraolo's backyard and the surrounding area. This issue, therefore, did not become a factor in the opinion of the Court. *Id.* at 1812 n.1.

⁹⁶ *Id.* at 1812.

⁹⁷ *Id.* In determining the manifestation and context of an individual's expectation of privacy, the Court will scrutinize the conduct of that individual. For example, in *Katz* the petitioner shut the door of the telephone booth and paid the toll which would allow him to make a call. *Katz v. United States*, 389 U.S. 347, 352 (1967). By taking these actions, he was "entitled to assume that the words he utter[ed] into the mouthpiece will not be broadcast to the world." *Id.*

In another case, David Rawlings placed a large quantity of illegal drugs into the purse of Vanessa Cox. *Rawlings v. Kentucky*, 448 U.S. 98, 101 (1980). While executing an arrest warrant, the police searched the purse and discovered the drugs. *Id.* The Court found that Rawlings did not have a subjective expectation of privacy concerning the contents of the purse. *Id.* at 106. In reaching this conclusion, the Court took cognizance of the fact that Rawlings placed illegal drugs worth thousands of dollars into the purse of a woman he had only known for a short time. *Id.* at 105. Rawlings also did not attempt to exclude others from gaining access to the purse. *Id.* These actions on the part of Rawlings led the Court to conclude that he did not take "normal precautions" to protect his privacy interest in the purse. *Id.* See *Smith v. Maryland*, 442 U.S. 735, 740 (1979) ("The first [inquiry] is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" (quoting *Katz*, 289 U.S. at 361) (emphasis added)).

⁹⁸ *Ciraolo*, 106 S. Ct. at 1812.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

not focus upon the private activities that an individual desires to keep secret. Rather, the Court should inquire "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." ¹⁰¹

After a cursory examination of the curtilage doctrine, the Court found that Ciraolo's backyard was in fact within the curtilage of the house.¹⁰² This determination, however, did not end the Court's analysis, because the fourth amendment does not prohibit "all" police observation of the area within the curtilage.¹⁰³ Chief Justice Burger then explained the circumstances under which the police may view the curtilage without committing an unconstitutional search.

Although the fourth amendment specifically protects houses from unreasonable governmental intrusion, the amendment does not demand that police officers "shield their eyes" every time they go by a house while traveling on "public thoroughfares."¹⁰⁴ Whatever actions an individual may have taken to conceal the activities occurring on his property, a police officer may constitutionally observe the property "from a public vantage point where he has a right to be and which renders the activities clearly visible."¹⁰⁵

In order to support this conclusion, the Court cited one case, *United States v. Knotts*.¹⁰⁶ *Knotts* involved the placement of a radio transmitter, commonly known as a "beeper," inside a container of chloroform, a chemical used in manufacturing illicit drugs.¹⁰⁷ Law enforcement officials used both the "beeper" and visual surveillance to follow the container to a secluded cabin.¹⁰⁸ Anyone could have followed the car with the container of chloroform as it traveled along public roads to the cabin.¹⁰⁹ *Knotts*, therefore, did not have a reasonable expectation of privacy from "visual observations of . . . [the] . . . automobile arriving on his premises after leaving a public highway, nor [from] movements of objects such as the drum of chlo-

¹⁰¹ *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 181-83 (1984)).

¹⁰² *Id.* The brevity of the Court's analysis regarding the applicability of the curtilage doctrine resulted from several factors. First, the close proximity of the fenced-in backyard to Ciraolo's home gave the yard the necessary characteristics of a curtilage. *Id.* Second, the state of California accepted that the yard, along with the marijuana growing there, formed part of the curtilage. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 460 U.S. 276 (1983).

¹⁰⁷ *Id.* at 278.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 281-82.

reform outside the cabin in the 'open fields.'"¹¹⁰ Because the "beeper" did not reveal anything more than the police would have been able to see with their own eyes, its use did not constitute a search under the fourth amendment.¹¹¹

Next, Chief Justice Burger quoted from the plurality decision in *Katz*. The Court reaffirmed that the fourth amendment does not protect those things or activities that an individual "'knowingly exposes'" to the public from warrantless observation.¹¹² Applying this reasoning to the facts of the case, the Court found that Ciraolo did not have a reasonable expectation of privacy from naked-eye, aerial surveillance of his backyard.¹¹³ The Santa Clara police officers made their observations from navigable airspace in a "physically nonintrusive manner."¹¹⁴ They observed what numerous other members of the public flying in the navigable airspace over Ciraolo's house could have observed.¹¹⁵ Society, therefore, would

¹¹⁰ *Id.* at 282 (citation omitted).

¹¹¹ *Id.* at 285. It could be argued that the Court in *Knotts* apparently found a constitutional distinction between police surveillance of activities taking place in the open fields and of those taking place within the curtilage. Chief Justice Burger in *Ciraolo* failed to perceive this distinction. Justice Powell, on the other hand, commented upon this distinction in his dissent. *California v. Ciraolo*, 106 S. Ct. 1809, 1818 (1986)(Powell, J., dissenting).

The Court's dicta in *United States v. Karo*, 468 U.S. 705, (1984), however, subtly points in these different directions at the same time. This case also involved the use of a "beeper." The issue in the case revolved around the fact that the "beeper" gave the police information that they could not have confirmed with their eyes—whether the container with the "beeper" was still located within the home. *Id.* at 715. In discussing this issue, the Court stated:

[H]ad a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For the purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it *could not have obtained by observation from outside the curtilage of the house*. . . . Even if visual surveillance has revealed that the article to which the beeper is attached *has entered the house*, the later monitoring not only verifies the officer's observations but also establishes that the article remains on the premises.

Id. (emphasis added). The question then becomes how could the government constitutionally watch the article enter the house without unconstitutionally viewing the curtilage at the same time?

¹¹² *Ciraolo*, 106 S. Ct. at 1812 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). The Court selectively quoted the language of the plurality opinion in *Katz*. See *supra* note 56 and accompanying text.

¹¹³ *Id.* at 1813.

¹¹⁴ *Id.* The Court's holding in *Katz* expressly rejected the contention that only a physical intrusion by law enforcement personnel would constitute a search under the fourth amendment. *Katz*, 389 U.S. at 353. See *infra* notes 125-26, 133-34 and accompanying text.

¹¹⁵ *Ciraolo*, 106 S. Ct. at 1813. Even though most members of the public flying in navigable airspace would not have the specialized training necessary to identify mari-

not view as reasonable Ciraolo's expectation of privacy from aerial observation of his curtilage.¹¹⁶

The Court also attempted to distinguish *Ciraolo* from *Katz* on the facts. Citing Justice Harlan's fears in *Katz* concerning the potential intrusions upon private communications from modern technology, Chief Justice Burger stressed that these fears did not involve "simple visual observations from a public place."¹¹⁷ According to the Court, Justice Harlan would not have considered an airplane a form of modern technology that would secretly impinge upon an individual's privacy as did the electronic listening devices in *Katz*.¹¹⁸

Finally, the Court invoked the language of Justice Harlan's concurrence in *Katz* in order to support its holding in the *Ciraolo* case. Justice Harlan stated in his concurrence that an individual expects privacy in his own home, "but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."¹¹⁹

juana plants at high altitudes, the Court found the fact that the two police officers had this training to be irrelevant. *Id.*

The Court also did not find any relevancy in the distinction the California Court of Appeal drew between "routine" police patrols and "focused" police observation. *Id.* at 1813 n.2. The Court found it difficult to comprehend how Ciraolo's expectation of privacy from focused aerial surveillance of his backyard would be any different from an expectation of privacy from routine aerial observation. *Id.* Making an analogy to ground-level observations, Chief Justice Burger concluded that "[t]he fact that ground-level observation by the police 'focused' on a particular place is not different from a 'focused' aerial observation under the fourth amendment." *Id.*

¹¹⁶ *Id.* at 1813.

¹¹⁷ *Id.*

¹¹⁸ *Id.* At this point in its analysis of Justice Harlan's concurrence in *Katz*, the Court apparently attempted to limit *Katz* to its own specific facts. Because *Katz* involved warrantless surveillance of telephone conversations, the Court concluded that Justice Harlan specifically feared the potential intrusion upon the privacy of individuals through the government's employment of modern, electronic surveillance devices. *Id.* Given the fact that airplanes were commonplace in 1967, the date of the *Katz* decision, the Court determined that Justice Harlan would not have viewed an airplane as a modern device that "could stealthily intrude upon an individual's privacy." *Id.*

¹¹⁹ *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). By using the phrase "plain view" in his concurrence in *Katz*, Justice Harlan blurred the distinction between the "plain view" doctrine and the "open view" doctrine. In the context of fourth amendment searches and seizures, the plain view doctrine has two specific applications. First, in those situations where a police officer is conducting an arrest and "is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object," the officer may seize the evidence without a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). Second, any object a police officer views while conducting a lawful search may be seized without first obtaining a specific warrant for that object. *Id.* at 465. These two applications of the plain view doctrine share the common fact that "the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Id.* at 466. Without this prior justification, the plain view doctrine

The open air exposure of Ciraolo's curtilage combined with the fact that private and commercial flights in public airspace have become routine, led the Court to hold that Ciraolo's expectation of privacy from naked-eye, aerial surveillance was not reasonable.¹²⁰ The fourth amendment, therefore, did not require the police to obtain a warrant prior to conducting this type of surveillance from navigable airspace.¹²¹

B. THE DISSENT

In his dissenting opinion, Justice Powell initially reiterated the criteria the Court had used to determine the scope of fourth amendment protection. He noted the Court's reliance on the common law in order to decide which types of searches the framers could have regarded as unreasonable.¹²² The common law, however, would not always be dispositive, because the Court would interpret the fourth amendment "'in light of contemporary norms and conditions.'" ¹²³ Justice Powell stated that the Court delineated the extent of fourth amendment rights "by asking if police surveillance has

alone will not justify the seizure of evidence without a warrant unless "exigent circumstances" are present. *Id.* at 468.

The open view doctrine, on the other hand, allows police officers to observe without a warrant those places, objects or activities that an individual "knowingly exposes to the public." *Katz*, 389 U.S. at 351. The open view doctrine does not require prior justification or inadvertence. *Randall v. State*, 458 So. 2d 822, 825 (Fla. Dist. Ct. App. 1984). See Note, *supra* note 2, at 743 n.112; Leading Cases, *Constitutional Law*, 100 HARV. L. REV. 100, 137 n.15 (1986)[hereinafter *Constitutional Law*]; *Warrantless Aerial Surveillance*, *supra* note 1, at 433 n.144.

The activities of the police officers in *Ciraolo* do not satisfy the requirements of the plain view doctrine. For their surveillance to be constitutional, it is vital that Ciraolo did in fact knowingly expose his backyard to public or open view.

The distinction between the plain view and open view doctrines may in part explain the qualitative difference the California Court of Appeal found between routine, aerial police patrols and focused police flights. See *supra* note 90 and accompanying text. Because the court found that Ciraolo did not knowingly expose his backyard to the public, the open view doctrine would not apply. Therefore, the Santa Clara Police could only prove the constitutionality of their behavior through the plain view doctrine by claiming either prior justification or inadvertence. A warrantless and focused flight could not support either of these claims.

¹²⁰ *Ciraolo*. 106 S. Ct. 1813.

¹²¹ *Id.* In a footnote, the Court suggested that warrantless aerial surveillance of the curtilage may violate the fourth amendment when it becomes invasive or when such surveillance combined with modern technology allows the police to view people, objects or activities that the police could not see with their unaided eyes. *Id.* at 1813 n.3.

¹²² *Id.* at 1815 (Powell, J., dissenting). See, e.g., *Steagald v. United States*, 451 U.S. 204, 217 (1981)("The common law may . . . be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable.").

¹²³ *Ciraolo*, 106 S. Ct. at 1815 (quoting *Steagald*, 451 U.S. at 217 n.10); see *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

intruded on an individual's reasonable expectation of privacy."¹²⁴

According to Justice Powell, the *Katz* test defines a fourth amendment search by examining an individual's reasonable expectation of privacy and not by examining "the physical position of the police conducting the surveillance."¹²⁵ Since modern technology could allow the police to conduct a search without committing a physical trespass, a fourth amendment test predicated upon physical intrusion would not provide adequate protection in a modern era.¹²⁶

Justice Powell then noted that the fourth amendment requires that an expectation of privacy be reasonable or legitimate.¹²⁷ He

¹²⁴ *Ciraolo*, 106 S. Ct. at 1815.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1815, 1817. In order to emphasize this point, Justice Powell invoked the rationale of the dissenters in *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting) and *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting). In both cases, the Court decided that the government's use of electronic surveillance methods to intercept private conversations did not violate the fourth amendment, because the government agents had not physically intruded upon a "constitutionally protected area." *Olmstead*, 277 U.S. at 466; *Goldman*, 316 U.S. at 134-35. In *Olmstead*, Justice Brandeis found that the Court's holding would severely limit fourth amendment protection in the future. He stated in his dissent:

The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?

Olmstead, 277 U.S. at 474 (Brandeis, J., dissenting) (footnotes omitted). Justice Murphy expressed this same view in his dissenting opinion in *Goldman*. He observed that

the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely the spirit motivating the framers of that Amendment would abhor these new devices no less.

Goldman, 316 U.S. at 139 (Murphy, J., dissenting) (footnote omitted). For all practical purposes, the Court overruled both *Olmstead* and *Goldman* with the *Katz* decision. *Katz*, 389 U.S. at 353, 362.

¹²⁷ *Ciraolo*, 106 S. Ct. at 1816. According to Justice Powell, the Court has used the words "reasonable" and "legitimate" synonymously. *Id.* at 1816 n.4. One commentator, however, disagrees with this conclusion, stating:

Although the Court has often used the terms "reasonable" and "legitimate" interchangeably, these terms reflect distinctly different expectations of privacy. A reasonable expectation of privacy in information is a reasonable expectation that information will not be discovered, given the information's content. A legitimate expectation of privacy in information is a legitimate expectation that information will not be discovered, regardless of the reasonableness of such an expectation under the circumstances.

found that the home constitutes a place where a subjective expectation of privacy will always be legitimate.¹²⁸ In the context of fourth amendment jurisprudence, the Court viewed the curtilage as “‘part of the home itself.’”¹²⁹ According to Justice Powell, society would also recognize as reasonable an individual’s expectation of privacy in “the area immediately surrounding [his] home.”¹³⁰

Next, Justice Powell attacked the majority’s analysis. The Justice noted that the Court would concur that an unreasonable search would have taken place if the police officers did not obtain a warrant prior to climbing over the fence or using a ladder in order to observe Ciraolo’s backyard.¹³¹ The Court, however, allowed the police to use an airplane in order to observe Ciraolo’s backyard without first obtaining a warrant.¹³² Moreover, Justice Powell found it irrelevant that the police conducted their overflight from navigable airspace and therefore did not physically intrude upon Ciraolo’s curtilage.¹³³ According to Justice Powell, “[r]eliance on the manner of surveillance is directly contrary to the standard of *Katz*, which identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society.”¹³⁴

Justice Powell determined that the Court’s holding rested upon a single fact: as members of the public fly through navigable airspace, they may look down at the homes and backyards that they happen to be flying over at the time.¹³⁵ Because private citizens

Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court’s Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 195 (1986)(footnotes omitted).

¹²⁸ *Ciraolo*, 106 S. Ct. at 1816 (Powell, J., dissenting).

¹²⁹ *Id.* (citation omitted). The Court, however, has never specifically extended *all* of the home’s fourth amendment protection to the curtilage. See, e.g., *Oliver v. United States*, 466 U.S. 170, 180 n.11 (1984)(“Nor is it necessary in these cases to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, *as opposed to the home itself*.”)(emphasis added); *Dow Chemical Co. v. United States*, 106 S. Ct. 1819, 1825 (1986)(“[T]he curtilage doctrine evolved to protect *much the same kind of privacy* as that covering the interior of the structure”)(emphasis added).

¹³⁰ *Ciraolo*, 106 S. Ct. at 1816.

¹³¹ *Id.* at 1817. See *United States v. Van Dyke*, 643 F.2d 992, 993-94 (4th Cir. 1981); *United States v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978).

¹³² *Ciraolo*, 106 S. Ct. at 1817. In the majority opinion, the Court sought to limit Justice Harlan’s concurrence in *Katz* to its particular facts. See *supra* notes 117-18 and accompanying text. Justice Powell, however, attempted to draw an analogy between electronic surveillance equipment and airplanes by referring to the airplane as “a product of modern technology.” *Id.* With his reference to *United States v. Van Dyke*, 643 F.2d 992 (4th Cir. 1981), Justice Powell appeared also to draw an analogy between an airplane and a very tall ladder.

¹³³ *Ciraolo*, 106 S. Ct. at 1817.

¹³⁴ *Id.* (emphasis in original).

¹³⁵ *Id.* at 1818.

could view Ciraolo's backyard, he had no reasonable expectation of privacy from police observation as well.¹³⁶ Justice Powell found this reasoning to be flawed for several reasons.

First, observation by passengers on private or commercial flights posed very little risk to Ciraolo's privacy.¹³⁷ Even though Ciraolo did not take any precautions to prevent aerial surveillance of his backyard, he did not "'knowingly expose'" it "'to the public.'" ¹³⁸ Since aerial observation by members of the public on airplanes is a "remote possibility," Justice Powell concluded that "[i]t is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards."¹³⁹

Second, the Court incorrectly relied upon *Knotts*.¹⁴⁰ *Knotts* involved activities taking place on public streets and highways.¹⁴¹ The fourth amendment does not prohibit the police from observing, just as members of the public could, activities occurring on a public street.¹⁴² The same conclusion, however, cannot necessarily be drawn concerning activities occurring "within the private area immediately adjacent to a home."¹⁴³ The Court reached its conclusion based upon the "judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance."¹⁴⁴ The Court failed to recognize that a "qualitative difference" existed between purposeful police surveillance of the curtilage conducted in order to discover evidence and the various reasons for which members of the public use navigable airspace.¹⁴⁵

Justice Powell then concluded that Ciraolo had a reasonable expectation of privacy from aerial surveillance by the police of his cur-

¹³⁶ *Id.*

¹³⁷ *Id.* Justice Powell noted that "[t]ravelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass." *Id.* (footnote omitted).

¹³⁸ *Id.* (citation omitted).

¹³⁹ *Id.*

¹⁴⁰ See *supra* notes 106-11 and accompanying text.

¹⁴¹ *Ciraolo*, 106 S. Ct. at 1818 (Powell, J., dissenting).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (footnote omitted).

¹⁴⁵ *Id.* Justice Powell found that "[m]embers of the public used the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards." *Id.* The same argument, however, could also be made to apply to public streets where police may constitutionally conduct focused surveillance without first obtaining a warrant. See *supra* notes 104-10 and accompanying text.

tilage.¹⁴⁶ Therefore, the police overflight constituted a search under the fourth amendment.¹⁴⁷ Since this warrantless search did not fall within the exceptions to the warrant requirement, the search violated the fourth amendment.¹⁴⁸

Finally, Justice Powell expressed his concern about the Court's holding. He saw "serious implications" concerning familial activities conducted within the curtilage of the home.¹⁴⁹ He noted that "after today, families can expect to be free of official surveillance only when they retreat behind the walls of their homes."¹⁵⁰

VII. ANALYSIS

As Justice Frankfurter stated over twenty years ago, "[t]he course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth."¹⁵¹ In *Ciraolo*, the conflicting conclusions as to what constitutes a search in the context of aerial surveillance exemplifies an inherent weakness in the *Katz* test. The first prong of the test focuses largely upon objective criteria through the examination of the actions manifesting the subjective expectations of the individual seeking to maintain his privacy.¹⁵² The second prong of the test involves a subjective type of inquiry on the part of the Court. The Court must determine whether society would honor as reasonable a particular individual's expectation of privacy.¹⁵³ In an age where a clear societal consensus fails to exist concerning many types of individual rights to privacy, the *Katz* test leaves the Court in a position where it must attempt its own best guess as to what privacy expectations society would view as reasonable.

One commentator argues that when the Court attempts to determine the reasonableness of an expectation of privacy, it relies upon "a set of largely arbitrary criteria."¹⁵⁴ Because of the arbitrary nature of the second prong of the *Katz* test, the adjudication of a reasonable expectation of privacy becomes vulnerable to the Court's "ideological oscillations."¹⁵⁵ Instead of society defining for the Court the scope of an individual's reasonable expectation of privacy, the *Katz* test allows the Court to dictate to society the reasona-

¹⁴⁶ *Ciraolo*, 106 S. Ct. at 1819.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1819 n.10.

¹⁵⁰ *Id.*

¹⁵¹ *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

¹⁵² See *supra* notes 95-97 and accompanying text.

¹⁵³ *Ciraolo*, 106 S. Ct. at 1811.

¹⁵⁴ Comment, *supra* note 127, at 196.

¹⁵⁵ *Id.* at 192.

bleness of an individual's privacy expectations. This flaw in the *Katz* test explains how the majority and the dissenters in *Ciraolo* could employ the same test and still reach vastly different conclusions as to the reasonableness of Ciraolo's expectation of privacy.

A. A QUESTION OF EXPOSURE

The Court found, *inter alia*, that society will not honor as reasonable Ciraolo's expectation of privacy from aerial surveillance of his backyard, because he knowingly exposed his backyard to all members of the public who routinely fly in the navigable airspace above it.¹⁵⁶ The Court has continually emphasized that knowing exposure does not take place when an individual takes "normal precautions to maintain his privacy."¹⁵⁷ In his majority opinion, Chief Justice Burger did not specifically state what establishes knowing exposure to aerial surveillance or what "normal" precautions Ciraolo might have taken to preclude aerial surveillance of his curtilage. Justice Powell, in his dissent, viewed Ciraolo's construction of a high, double fence around his backyard as a normal precaution against both ground-level and aerial surveillance.¹⁵⁸ The lower courts are divided as to whether or not a fence, or any other obstruction, creates an expectation of privacy from aerial surveillance.¹⁵⁹

Dow Chemical Co. v. United States, a case decided the same day as *Ciraolo*, involved the Environmental Protection Agency's (E.P.A.) use of aerial photography of Dow's two thousand acre industrial complex.¹⁶⁰ The Court noted that Dow did not make "any effort to protect [itself] against aerial surveillance"¹⁶¹ and held that the E.P.A.'s warrantless aerial photography of the Dow facility did not violate the fourth amendment.¹⁶² Combining the Court's dicta in *Dow* and *Ciraolo*, it would appear that if Ciraolo had taken specific precautions against aerial observation he would not have knowingly exposed his backyard to those members of the public flying in the navigable airspace above his house.

The California Court of Appeals recently dealt with this issue and rejected the contention that specific precautions against aerial

¹⁵⁶ *Ciraolo*, 106 S. Ct. at 1812-13.

¹⁵⁷ *Id.* at 1812 (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980)). See *supra* note 97.

¹⁵⁸ *Ciraolo*, 106 S. Ct. at 1818 (Powell, J., dissenting).

¹⁵⁹ Annotation, *supra* note 2, at 787-90; Comment, *supra* note 2, at 745-46.

¹⁶⁰ 106 S. Ct. 1819 (1986).

¹⁶¹ *Id.* at 1829 n.4.

¹⁶² *Id.* at 1827.

surveillance will make warrantless, aerial observations by the police unconstitutional.¹⁶³ The court of appeal refused to employ the Supreme Court's dicta in *Dow* concerning specific precautions against aerial surveillance to limit the broad holding in *Ciraolo*. *Dow* involved the warrantless aerial surveillance of the open fields.¹⁶⁴ *Ciraolo*, on the other hand, dealt with warrantless aerial surveillance of the curtilage.¹⁶⁵ This key factual distinction between the two cases, in addition to the Supreme Court's refusal to specifically limit its broad holding in the *Ciraolo* decision, led the court of appeal to conclude that the dicta in *Dow* could not be applied to the Supreme Court's holding in *Ciraolo*.¹⁶⁶

Therefore, according to the court of appeal's interpretation of *Ciraolo*, it does not matter what precautions an individual may take to preclude aerial observation of his backyard. When law enforcement officials flying in navigable airspace can peek through even the most formidable of defense systems, an individual has still knowingly exposed his property, and warrantless aerial surveillance of his property will be constitutional.

If the Court's decision in *Ciraolo* truly means that the fourth amendment does not protect an individual's backyard from aerial surveillance no matter what "normal precautions" that individual may take, it has single-handedly emasculated much of the intent behind the fourth amendment. As Professor LaFave observed:

Anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the [fourth] amendment, because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function. What kind of society is that?¹⁶⁷

It ultimately becomes a matter of conjecture as to which view, the Court's view in *Ciraolo* or Professor LaFave's view, society would agree with and find reasonable.

In the *Katz* decision, the Court expressly recognized that the constitutional protection provided to reasonable expectations of privacy does not automatically vanish once an individual dares to

¹⁶³ *People v. Sabo*, 185 Cal. App. 3d 845, —, 230 Cal. Rptr. 170, 173 (1986).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 1 W. LAFAVE, *supra* note 10, § 2.2, at 261 (quoting *Amsterdam*, *supra* note 64, at 402). Justice Powell expressed these same concerns in his dissent. *California v. Ciraolo*, 106 S. Ct. 1809, 1819 n. 10 (1986) (Powell, J., dissenting). See W. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* § 8.1 at 8-3 (1985).

venture out of doors and voluntarily subjects himself, his property or his activities to limited public exposure. While the Court has continually repeated the majority's language in *Katz* that what "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,"¹⁶⁸ it has apparently forgotten the language that follows and tempers that broad sentence. The Constitution may still provide protection to what an individual "seeks to preserve as private, even in an area accessible to the public."¹⁶⁹

Since the public had access to the navigable airspace above Ciraolo's property, it also had limited opportunities to view his backyard from the air. Ciraolo, for his part, made an attempt to preserve his privacy interest in his property. Rather than examining what protections the Constitution may have provided Ciraolo's expectation of privacy, the Court simply concluded that Ciraolo's expectations were not reasonable because the public had limited visual access to his property.

This parsimonious view of constitutional protections in *Ciraolo* follows an overall trend in the Court's holdings limiting the scope of fourth amendment protection concerning expectations of privacy. According to Professor LaFave, the Court has often adopted an "exceedingly narrow view of *Katz*."¹⁷⁰ The Court has relied upon the "fallacious notion that privacy is an all-or-nothing proposition and that a person has no legitimate expectation of privacy *vis à vis* the government concerning information partly exposed in a very limited way to a limited group."¹⁷¹ When even a remote possibility of exposure exists, as it did in *Ciraolo*, the Constitution can offer no protection to a person's expectation of privacy.¹⁷²

In *Ciraolo*, Chief Justice Burger also attempted to support the knowing exposure argument by stressing that, along with passengers on private and commercial airplanes, a "power company repair mechanic on a pole overlooking the yard" could have viewed Ciraolo's curtilage.¹⁷³ This rationale directly conflicts with the express language of the Court in *United States v. Karo*.¹⁷⁴ Writing the opinion for the Court, Justice White noted that "[t]here would be nothing left of the Fourth Amendment right to privacy if anything

¹⁶⁸ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁶⁹ *Id.*

¹⁷⁰ LaFave, *Nine Key Decisions Expand Authority to Search and Seize*, 69 A.B.A. J. 1740 (1983).

¹⁷¹ *Id.*

¹⁷² *Constitutional Law*, *supra* note 119, at 141-42.

¹⁷³ *California v. Ciraolo*, 106 S. Ct. 1809, 1813 (1986).

¹⁷⁴ 468 U.S. 705 (1984).

that a *hypothetical* government informant *might* reveal is stripped of constitutional protection.”¹⁷⁵ Taking the Court’s logic in *Ciraolo* and extending it to the circumstances involved in the *Katz* case, Katz would not have had a “reasonable expectation of privacy in his conversation because the person to whom he was speaking might have divulged the contents of the conversation.”¹⁷⁶

B. THE USE OF MODERN TECHNOLOGY

In *Ciraolo*, Chief Justice Burger and Justice Powell disagreed as to whether an airplane constituted a form of modern technology. While such a debate may appear to be nothing more than an argument over semantics, the determination of the question is relevant in defining the scope of fourth amendment protection over expectations of privacy.

The Court held in *Karo* that when law enforcement officials occupy a public vantage point and modern technology provides them with information that they could not have gained through visual surveillance alone, the use of this technology constitutes a search under the fourth amendment.¹⁷⁷ Because the Santa Clara Police could only confirm their anonymous tip by using aerial surveillance, defining the airplane they used as a product of modern technology, as Justice Powell did, would mean that the police conducted a fourth amendment search.

Chief Justice Burger argued that in a day and age where “private and commercial flight in the public airways is routine,” it would be unreasonable for *Ciraolo* to expect the Constitution to shield his backyard from the inquiring glances of those flying overhead.¹⁷⁸ To determine a reasonable expectation of privacy based upon whether a particular police practice is routine, however, allows the police and not society to determine the reasonableness of an expectation of privacy.¹⁷⁹

The implications of the *Ciraolo* decision will also create future difficulties concerning law enforcement officials and their increasing use of cameras and helicopters. The Court’s dicta in both *Ciraolo* and *Dow* provides some guidance as to the extent to which the

¹⁷⁵ *Id.* at 716 n.4. (emphasis in original).

¹⁷⁶ *Id.* Justice White apparently did not want to extend the *Karo* Court’s dicta to *Ciraolo*. He formed part of the majority.

¹⁷⁷ *United States v. Karo*, 468 U.S. 705 (1984).

¹⁷⁸ *Ciraolo*, 106 S. Ct. at 1813.

¹⁷⁹ Comment, *Aerial Surveillance: A Plane View of The Fourth Amendment*, 18 GONZ. L. REV. 307, 318 (1982/83).

fourth amendment will allow the police to use aerial photography without first having to obtain a warrant.

The use of aerial photography without a warrant unconstitutionally impinges upon privacy interests at the point where it allows the police to see and record "those intimate associations, objects or activities otherwise imperceptible" to them.¹⁸⁰ While discussing in *Dow* whether the picture taken with a sophisticated aerial mapping camera violated the fourth amendment, Chief Justice Burger found "[n]o objects as small as 1/2-inch diameter such as a class ring, for example, are recognizable, nor are there any such identifiable human faces or secret documents captured in such fashion as to implicate more serious privacy concerns."¹⁸¹ This dicta implies that if the Santa Clara Police had used a high-power camera to take aerial photographs of Ciraolo's backyard in order to facilitate the identification of Ciraolo or the purchasers of his marijuana, this would constitute a warrantless search in violation of the fourth amendment.

Chief Justice Burger in part based his conclusion that society would not recognize as reasonable Ciraolo's expectation of privacy from aerial surveillance on the fact that the police made their observations from navigable airspace, a place where they had a right to be.¹⁸² One lower federal court has recently held that warrantless observations not conducted in navigable airspace would violate the fourth amendment.¹⁸³

According to federal regulations, fixed-wing aircraft may only lawfully navigate at or above certain specific altitudes.¹⁸⁴ Unlike airplanes, the airspace for the lawful operation of a helicopter consists of an altitude at which it may be operated "without hazard to persons or property on the surface."¹⁸⁵ Helicopters, therefore, may le-

¹⁸⁰ *Ciraolo*, 106 S. Ct. at 1813 n.3.

¹⁸¹ *Dow Chemical Co. v. United States*, 106 S. Ct. 1819, 1827 n.5 (1986).

¹⁸² *Ciraolo*, 106 S. Ct. at 1813. Chief Justice Burger also expressed in *Dow* the fact that the aerial photographer's aircraft continually remained in navigable airspace throughout the flight. *Dow*, 106 S. Ct. at 1822.

¹⁸³ In light of the *Ciraolo* and *Dow* decisions, the Court of Appeals for the Eighth Circuit observed:

In both cases the Court mentioned that the official aircraft conducting the searches was within public navigable airspace. Federal statutes and regulations, defining navigable airspace, were cited. It seems that if, to take *Dow* as an example, the EPA-rented airplane had not been in navigable airspace, a different result would have followed, even though such reasoning makes constitutional protections under the Fourth Amendment depend, in part, on the contours of statutes and regulations, which are subject to change by Congress or the issuing regulatory agency.

Bissonette v. Haig, 800 F.2d 812, 815 (8th Cir. 1986).

¹⁸⁴ See *supra* note 79.

¹⁸⁵ 14 C.F.R. § 91.79(d)(1986). The subsection concerning helicopters states:

(d) *Helicopters*. Helicopters may be operated at less than the minimums prescribed

gally fly below navigable airspace.¹⁸⁶ Lower courts thus face a fourth amendment dilemma when a police department conducts warrantless aerial surveillance with a helicopter lawfully flying below navigable airspace.

The California Court of Appeals recently dealt with this question in *People v. Sabo*.¹⁸⁷ The court concluded that “*Ciraolo* does not declare a rule to govern aerial surveillance of the curtilage in all circumstances and at any altitude and from any platform.”¹⁸⁸ In cases involving the lawful operation of a helicopter outside of navigable airspace, the court decided not to declare a broad rule and returned to a case-by-case analysis in order to determine the constitutionality of this type of surveillance.¹⁸⁹

C. AN ALTERNATIVE STANDARD

As Justice Harlan observed in *United States v. White*, the purpose of the fourth amendment is “not to shield ‘wrongdoers’; but to secure a measure of privacy and sense of personal security throughout society.”¹⁹⁰ The Court’s holding in *Ciraolo* weakens, rather than secures, individual privacy by allowing law enforcement officials to scrutinize from the air what they could not constitutionally view at ground-level without first obtaining a warrant. As long as the remotest possibility of aerial exposure to the public exists, the police may constitutionally look as well. Precautions against exposure, therefore, become virtually useless.

Given the importance of the privacy right at stake and the relative lack of societal consensus as to how much the government may impinge upon that right before its behavior becomes unreasonable, the Court’s broad, all-or-nothing holding in *Ciraolo* is inappropriate.

Instead of developing one all-encompassing rule of constitutional law, the Court should have at least examined the possibility of a modified warrant requirement in cases involving aerial surveillance. Under a modified warrant standard, the police would not have to show probable cause in order to obtain a warrant. For ex-

in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes prescribed for helicopters by the Administrator.

Id. See *supra* note 79 for the complete text of subsections (b) and (c) of 14 C.F.R. § 91.79.

¹⁸⁶ *People v. Sabo*, 185 Cal. App. 3d 845, —, 230 Cal. Rptr. 170, 174-75 (1986).

¹⁸⁷ 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (1986).

¹⁸⁸ *Id.* at —, 230 Cal. Rptr. at 175.

¹⁸⁹ *Id.* at —, 230 Cal. Rptr. at 175.

¹⁹⁰ 401 U.S. 745, 790 (1971) (Harlan, J., dissenting).

ample, a "reasonable suspicion" standard might suffice.¹⁹¹

A neutral and detached magistrate would also be present to protect reasonable expectations of privacy against undue police interference. The magistrates, like the lower courts, will no doubt reach conflicting conclusions when they attempt any type of *Katz* analysis. But even under this admittedly inefficient system, the police will not have completely free rein regarding aerial surveillance from navigable airspace as they do under *Ciraolo*.

The employment of some type of lesser probable cause standard, rather than no standard at all, would demonstrate that a qualitative difference exists between intentional and accidental police aerial surveillance. The exclusionary rule itself is a manifestation of the Supreme Court's opinion that such a qualitative difference does in fact exist. The Court has noted that the purpose of the exclusionary rule is to deter the police from violating the warrant requirement of the fourth amendment, and the application of the exclusionary rule becomes unwarranted if it would not deter police conduct.¹⁹² While the exclusionary rule will deter intentional police conduct, it has a substantially weaker deterrent affect concerning accidental police conduct.¹⁹³

This view of the exclusionary rule leads to the conclusion that a warrant requirement for aerial surveillance would deter intentional police searches but would not deter accidental police searches of the property the police happen to be flying over at any given time. Therefore, when an individual like *Ciraolo* can adequately prove that the police intentionally used aerial surveillance in order to view his specific residence, the evidence gathered during and subsequent to the unconstitutional search must fall within the exclusionary rule. Since the exclusionary rule cannot deter accidental conduct, evidence obtained while the police unintentionally survey property or activities from navigable airspace should not fall within the exclusionary rule.

VIII. CONCLUSION

The Supreme Court's holding in *California v. Ciraolo* that the police's intentional and warrantless aerial surveillance of a specific residence does not violate the Constitution gives law enforcement agencies broader powers while at the same time substantially lessen-

¹⁹¹ *Warrantless Aerial Surveillance*, *supra* note 1, at 435.

¹⁹² *United States v. Leon*, 468 U.S. 897, 908-17 (1984); *see supra* note 29 and accompanying text.

¹⁹³ *Leon*, 568 U.S. at 908-17.

ing the scope of fourth amendment protection of privacy expectations. As long as the police conduct their surveillance from navigable airspace, an individual who knowingly exposes his property or activities to the open air, no matter how slight this exposure may be or where such exposure takes place, automatically subjects himself to the scrutiny of the police. This calls into question what privacy protections from aerial surveillance remain, if any, once an individual dares to step outside his home.

In addition, the *Ciraolo* decision demonstrates that the *Katz* test, used to determine the reasonableness of an individual's privacy expectations, has increasingly become a more subjective test. Both the majority and the dissenters employed this test, yet both sides reached vastly differing results concerning society's view of the reasonableness of *Ciraolo*'s privacy expectations. This subjectiveness decreases any predictability the test may have had and perhaps signals the beginning of the end for the *Katz* test.

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